STATE OF MAINE **LAW COURT DCKT # HAN-19-245**
Cumberland, ss.

IN THE MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

STATE OF MAINE	**|**	
Plaintiff/Appellee,	**|**	
	|	**APPELLEE'S BRIEF**
-VS-	**|**	
	|	
RICHARD TONINI	**|**	
Defendant/Appellant	**|**	

Prepared By:

Toff Toffolon
Deputy District Attorney
70 State Street
Ellsworth, Maine 04605

STATEMENT OF FACTS

The State agrees with the facts set forth in the appellant's brief. The State asserts that the following additional facts are relevant:

1. The trial court considered the language of 18 United States Code {922(g)(3), and the parties stipulated that marijuana is a "controlled substance". (T 6-8).
2. The trooper weighed the large bag of marijuana seized from the defendant using the scale which he used during the investigation, and reported the weight of the marijuana at 5.48 ounces. All of this occurred in the presence of the jury. (T-42)
3. The trooper found a sandwich baggie of marijuana in the console of the defendant's car. (T-39)
4. The trooper checked with the Maine Department of Human Services Medical Marijuana Program and he determined that the defendant was not a medical marijuana caregiver listed in the system. (T-49)
5. At the conclusion of the State's case-in-chief, the defense moved for a judgment of acquittal on both counts, but only count two is relevant here, since the jury acquitted the defendant on count one. In considering the motion, the trial judge took no position on whether one could infer that Mr. Tonini was a marijuana user, and the trial court agreed that illegal use would be derived from federal law. (T-55)
6. At the conclusion of the evidence, the defense renewed its motion for acquittal, and the judge discussed how the State would prove that Mr. Tonini was a marijuana "user". The State responded that the jury could draw a reasonable inference that Mr. Tonini's possession of a big bag of marijuana made him a "furnisher", and his possession of a small bag would allow the jury to conclude that he was also a "user". The State cited authority from the federal court stating that the prosecution does not need to show that a defendant was under the influence of marijuana at the time of the alleged offense in order to demonstrate that the defendant is a user. (T-68) Ultimately, the trial court denied the motion for judgment of acquittal on count two. (App. 21)

SUMMARY OF ARGUMENT

ISSUE I: The government can place restrictions on the right to bear arms, such as prohibiting felons from possession. Certainly the government has a legitimate interest in keeping users of federally unlawful substances, such as marijuana, from having weapons.

ISSUE II: There was ample circumstantial evidence from which the jury could conclude that Mr. Tonini was a user of marijuana.

ISSUE III: Merely because the criminal code does not define every term used in statutes, (in this case, the term "user"), the statute is not unconstitutionally vague because the jury may apply its common sense understanding of the term.

ISSUE IV: The *Kargar* decision does not compel the motion court to articulate its reasoning as to each factor in a written decision. A "de minimis" finding is a safety valve designed to avoid injustice. There was no injustice demonstrated in the Tonini decision.

ARGUMENT

ISSUE I: The appellant correctly points out that this issue was not raised below, and that the reviewing court will only notice unpreserved error if that error seriously affects the fairness and integrity or public reputation of judicial proceedings. The State argues that this standard has not been met, because the judge and jury correctly and dispassionately applied the facts to existing law. If Mr. Tonini is aggrieved, it is with the *legislative*, not the *judicial* branch of government.

Further, the appellant's argument fails because the language of count two of the complaint, unlike the vast majority of Maine's other criminal statutes, makes specific reference to federal law. Therefore, there is an unambiguous legislative intent to enforce aspects of the federal law pertaining to users of federally controlled substances. Therefore, the argument concerning state legalization of marijuana is moot.

Finally, the appellant distinguishes the instant statute from the long standing prohibition against felons possessing firearms., and he says that the government's interest in criminalizing gun possession for marijuana users cannot be "compelling". The State disagrees. The appellant apparently concedes that it is permissible for the government to prohibit a person with a Class C habitual motor vehicle offense, a status crime, from having a gun, but it is impermissible for the State to prohibit the State from likewise prohibiting a person who uses a product the sole function of which is to alter the operation of body and mind. Is not the public safety concern of the State greater in the latter case? A similar constitutional analysis may be applied in the case of aliens in the country illegally. Their ban on possession seems acceptably compelling to Mr. Tonini, even though that ban, broadly applied, includes people with no history of gun possession, violence, mental instability, or substance abuse concerns. Maine, or at least certain portions thereof, welcomes undocumented aliens. Their rights are no less infringed by classifying them as prohibited persons than are the rights of those who choose to use a state sanctioned drug, which is still illegal under federal law.

The appellant argues that even if the State's interest is found to be compelling, it is not sufficiently narrowly tailored. Again the State would point to the banned habitually offending driver and the undocumented alien, for whom the appellant recognizes the prohibition as appropriate. Certainly the ban on drug users is more tailored than it is for the other persons mentioned above.

ISSUE II: The trial court properly instructed the jury that it was free to give the same weight to circumstantial evidence as it did to direct evidence. The State argued that the presence of a large bag of marijuana in plain view, coupled with the discovery of a sandwich bag of marijuana stored in the console of the defendant's car, was ample evidence of Mr. Tonini's use. While the defense pointed out that the officer did not smell marijuana smoke, did not find any burnt marijuana cigarettes, and did not find evidence of impairment, the jury was free to weigh the discovery of actual marijuana and to reasonably conclude that Mr. Tonini was a user. Further, the jury could have inferred from the defendant's lack of registration as a medical marijuana caregiver that his marijuana was for personal use, an inference strengthened by the acquittal on the count one furnishing charge.

ISSUE III: The appellant argues that a person charged with the violation defined by count two of the complaint "would find it difficult to understand what is prohibited". (Appellant's Brief 18). Such a person would have to be completely and illogically unaware that federal law prohibits the use of marijuana. Thus, even if the State condones certain uses, it is reasonably presumed that people living in this country understand that ingesting marijuana is still contrary to federal law, making such use "unlawful". It is a stretch which defies acceptance to contend that due process notions of notice are offended by the instant statute. One need not reach the question raised by the appellant as to whether one use or multiple uses are required in order to violate the law. *Any* use of marijuana pursuant to federal law, just like *any* felony, makes gun possession unlawful.

ISSUE IV: The State incorporates by reference its written argument found at pages (18) and (19) of the appendix. Rather than merely cutting and pasting that language in its brief, the State respectfully refers the justices to that section. Appellant's references to Mr. Tonin's "perhaps" status as a medical marijuana caregiver, and to his offer of proof, had he been allowed to give one, should not be considered by this court, because they are not facts derived from the evidence adduced at trial. The argument that a de minimis finding should have been made because no harm was caused or threatened (Appellant's Brief 22) cannot be persuasive, because if this were the standard, then the court will be faced with appeals from habitual motor vehicle offenders who were observing all motor vehicle laws while driving down the road with a deer rifle in a gun rack.

The appellant also argues that the court's written decision on the motion for a deminimis finding does not meet the *Kargar* test of completeness. However, that decision references the written arguments of the parties, as well as the court's own notes. It is clear from documents contained in the appendix that the parties were aware of *Kargar,* and that they based their arguments on those factors which they felt to be relevant in this case. Therefore, it seems clear that the motion judge considered the relevant factors when denying the motion.

Dated at Machias, Maine this 15th day of October, 2019.

_____
Toff Toffolon
For the Appellee
Bar No.: 3349

CERTIFICATE OF SERVICE

On the date shown below, I deposited two copies of this document in the drop box maintained for Attorney Coolidge at the Office of the District Attorney.

Date:

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Toff Toffolon

TABLE OF CONTENTS

TABLE OF AUTHORITIES